

ESTTA Tracking number: **ESTTA665020**

Filing date: **04/06/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77530392
Applicant	Sparta Beverage LLC
Applied for Mark	SPARTAN MEAL
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Submission	REQUEST TO SUSPEND PROCEEDINGS
Attachments	Request to Suspend-Spartan Meal.pdf(327904 bytes )
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Date	04/06/2015

**United States Patent and Trademark Office  
Trademark Trial and Appeal Board**

In re Sparta Beverage LLC  
Mark: SPARTAN MEAL  
Serial No. 77530392

**REQUEST TO SUSPEND  
PROCEEDINGS**

**INTRODUCTION**

Appellant hereby requests that in the interest of justice and judicial economy to prevent additional needless litigation, that the Board suspend the instant appeal pending final resolution of pending applications "SPARTAN FUEL, Serial Number 85567313" and "SPARTAN Serial Number 77567596".

**ARGUMENT**

Said applications are filed subsequent to the Appellant's application and are confusingly similar yet they are being prepped for registration and or have been published. 85567313 is in class 005 for Nutritional supplements and 77567596 in class 32 for beverages that contain Whey protein which would make interchangeable with class 005. Registration of one or both of these marks will violate appellant's due process and equal protection rights and will provide legal basis that SPARTAN MEAL should be registered.

**REQUEST FOR JUDICIAL NOTICE**

Additionally Applicant requests that the Board take judicial notice of application 77532353 for SPARTAN ENERGY. Said application was refused by examining attorney on basis of Confusion and affirmed by this Board. Please take judicial notice of Board opinion dated July 1 2014 (hereto attached). Despite the fact that 77532353 in class 32 for fortified beverages was denied and affirmed on appeal, application 77567596 for virtually same products have been approved for publication.

**CONCLUSION AND PAYER**

Publication and registration of the subsequently filed applications 85567313 and 77567596 will directly effect this Appellant's rights and legal basis for registration of SPARTAN MEAL. Therefore it would be prudent and Appellant hereby requests that the Board suspend this appeal until final resolution of applications 85567313 and 77567596.

Respectfully submitted;

*/sam hope/*

Sparta Beverage LLC

April 6, 2015

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

Mailed:  
July 1, 2014

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

*In re Sparta Beverage LLC*

Serial No. 77532353

Sparta Energy LLC, *pro se*<sup>1</sup>.

Lourdes Ayala, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow,  
Managing Attorney).

Before Seeherman, Wellington, and Ritchie, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Sparta Beverage LLC filed an application to register the mark SPARTAN ENERGY and design, as shown below, for goods ultimately identified as "enhanced beverages, namely energy drinks," in International Class 32<sup>2</sup>:

<sup>1</sup> Represented by Sam Hope, General Manager.

<sup>2</sup> Application Serial No. 77532353, filed July 28, 2008 pursuant to Section 1(b) of the Trademark Act, 15 U.S.C., § 1051(b); amended to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a) alleging dates of first use and first use in commerce on April 1, 2010, and disclaiming an exclusive right to the term "ENERGY" apart from the mark as shown. The issue of the identification of goods is discussed herein. The color gold is claimed as a feature of the mark.



The Trademark Examining Attorney refused registration of the mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the previously registered marks SPARTAN,<sup>3</sup> in standard character format, and SPARTAN and design,<sup>4</sup> as shown below, both owned by the same entity, and both identifying, *inter alia*, "fruit juices, fruit flavored beverages, drinking water, spring water, soft drinks, pop, vegetable juices,"

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<sup>3</sup> Registration No. 3067847, issued March 14, 2006. Sections 8 and 15 affidavits accepted and acknowledged. This registration contains goods in other classes.

<sup>4</sup> Registration No. 3095219, issued May 23, 2006. Sections 8 and 15 affidavits accepted and acknowledged. This registration contains goods in other classes. The colors green, yellow-green and white are claimed as a feature of the mark.

in International Class 32, that as used in connection with applicant's identified goods, applicant's mark is likely to cause confusion, mistake, or to deceive:



The Examining Attorney further refused to accept an amendment of goods, including a reinsertion of previously deleted goods, proffered by Applicant in its May 29, 2013 Response to Office Action. Upon final refusal of registration, Applicant filed a timely appeal. Both Applicant and the Examining Attorney filed briefs, and Applicant filed a reply brief. After careful consideration of the arguments and the evidence of record, we affirm the refusal to register and the Examining Attorney's action with respect to the identification of goods.

#### **Reinsertion of Previously Deleted Goods**

Applicant originally filed its application identifying "beer; black beer; bottled drinking water; brewed malt-based alcoholic beverage in the nature of a beer; coffee-flavored beer; coffee-flavored soft drink; concentrates, syrups or powders used in the preparation of soft drinks; drinking water with vitamins; energy drinks; frozen beverages; isotonic beverages; malt liquor; non-alcoholic malt beverage; powders used in the preparation of isotonic sports drinks and sports beverages; soft

drinks: sports drinks; whey beverages.” With its March 22, 2012 Response to Office Action, Applicant voluntarily deleted all but “energy drinks” from the identification of goods, stating: “Items in the description of goods that may have been a source of confusion have been deleted. Therefore, respectfully request [sic] that any objection on the basis of Likelihood of Confusion to be withdrawn [sic].”<sup>5</sup> Applicant further amended the identification of goods on October 2, 2012 to “enhanced beverages, namely energy drinks.” The amendments were accepted by the Examining Attorney.

On May 29, 2013, Applicant attempted to reinsert goods into the identification, specifically, “enhanced beverages, namely, energy drinks and sport drinks and powders used in the preparation of same.” The Examining Attorney rejected this attempt, stating that since Applicant had voluntarily deleted the goods, it could not later reinsert them. The Examining Attorney cited TMEP § 1402.06(a) (2014), which states

**1402.06(a) Limiting the Identification of Goods and Services**

As noted above, the rules permit amendments to limit the identification of goods and services. Deletions from the identification of goods and services are also permitted. “Deletion” means the elimination of an existing item in an identification of goods and services in its entirety. If the applicant wishes to amend the identification of goods and services to delete one or more items, the examining attorney should accept the amendment, if it is timely and otherwise proper. However, once the applicant has expressly amended the identification of goods and services to delete an item, it may not be reinserted in a later amendment.

Applicant asserts that the relevant provision is TMEP § 1402.07(e), which reads, in relevant part, as follows:

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<sup>5</sup> This amendment to the identification was filed subsequent to the amendment to allege use, which was filed on May 4, 2009, and asserted use in commerce for the goods as listed in the original identification.

**1402.07(e) Permissible Scope of Identification Affected by Proposed Amendment That Is Acceptable**

....  
The only circumstance in which the applicant may reinsert goods or services that were omitted or deleted from the identification of goods or services is when before publication or within six months of the issuance of an examiner's amendment (*see* TMEP § 707 *et seq.*), whichever is earlier, the applicant objects to an amendment of the identification of goods or services in the examiner's amendment *on the ground that the examiner's amendment does not reflect the agreement between the applicant and the examining attorney.*

This provision of the TMEP contemplates reinsertion of goods or services that were deleted by an examiner's amendment and without the consent of the applicant. In short, it applies to situations where an examiner's amendment does not reflect the amendment authorized by the applicant. It does not apply to situations, such as the one at hand, where Applicant itself deleted the goods voluntarily via a Response to Office Action. Thus, as noted by the Examining Attorney, the relevant provision of the TMEP is § 1402.06(a), which states clearly, "However, once the applicant has expressly amended the identification of goods and services to delete an item, it may not be reinserted in a later amendment." Accordingly, Applicant's identification of goods shall remain, per its latest accepted amendment, "enhanced beverages, namely energy drinks."<sup>6</sup>

**Likelihood of Confusion**

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services.

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<sup>6</sup> We note that the additional items would not have affected the outcome of our analysis of likelihood of confusion.



See *Federated Foods, Inc. v. Fort Howard Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks”). We consider each of the factors as to which Applicant or the Examining Attorney presented arguments or evidence. To the extent that any other factors are relevant, we treat them as neutral.

#### The Marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). The mark in cited Registration No. 3067847 consists of the term SPARTAN, in standard characters. This term is incorporated in full in Applicant’s mark, which consists of the literal element SPARTAN ENERGY, and a design of a helmet. The added, and disclaimed, term “ENERGY” does not serve to change the commercial impression, since it is descriptive of Applicant’s goods. *In re National Data Corp.*, 224 USPQ 749, 751 (Fed. Cir. 1985) (“[T]here is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.”). We further note, that with regard to the design in Applicant’s mark, it is well-established that it is typically the words that consumers will use to call for or refer to goods or services. *In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012), citing *CBS Inc. v. Morrow*, 708 F.2d 1579, 218

USPQ 198 (Fed. Cir. 1983). Indeed, in Applicant's mark the design merely serves to emphasize the commercial impression of the literal element, i.e., that of a Spartan warrior. Accordingly, we find that, when considered in their entireties, the marks have effectively the same meaning and commercial impression, as well as strong similarities in sight and sound.

While the mark in cited Registration No. 3095219 also contains a design element, the design is minimal and the literal word "SPARTAN" dominates, and we find that the design does not change the commercial impression, nor does the additional wording "EST. 1953," which would merely inform consumers of the year the brand or company may have been established. We find similarities with the sight, sound, meaning and commercial impression with this mark as well.

Applicant argues that the shared term "SPARTAN" is weak, stating in its appeal brief, "Tess searches of live trademarks in the PTO database revealed 437 live SPARTAN applications and registrations (see attached TESS serch [sic] results), which are far too many to printout [sic] and analyze." (appl's brief at 6). Applicant did not make any of these applications and registrations of record, but it attached to its brief a list from the TESS database consisting of information about 17 applications and one registration (mark, serial number and registration number, status). In order to make a third-party registration of record, a copy of the registration, either a copy of the paper USPTO record, or a copy taken from the electronic records of the Office, should be submitted. *In re Volvo Cars of North America Inc.*, 46 USPQ2d 1455, 1456 n. 2 (TTAB 1998); and *In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974). Merely providing a list, as Applicant has done here, is insufficient. *In re Dos Padres Inc.*, 49 USPQ2d 1860, 1861 n. 2 (TTAB 1998). We add that even if these applications and registrations had been properly made of record, they would not support Applicant's argument. Third-party applications are evidence only of the fact that they have been filed. *See Frito-Lay North America, Inc. v.*

*Princeton Vanguard, LLC*, 109 USPQ2d 1949, 1956 n.9 (TTAB 2014) (“The applications are not evidence of anything except that they were filed.”) The single third-party registration is insufficient to show that SPARTAN is a weak mark.

Applicant further argues that “SPARTAN” is a house mark for Registrant, identifying 169 items in 8 classes, and that therefore the mark is entitled to less protection. We assume that it is Applicant’s position that because it uses SPARTAN ENERGY and design as a product mark, consumers who are familiar with Registrant’s house mark SPARTAN will recognize that the product mark SPARTAN ENERGY identifies products from a separate source. This argument is unavailing. The registration is not limited to use as a house mark; Registrant, rather, may use its mark as a product mark as well. See Section 7(b) of the Trademark Act.

Applicant further argued that similar marks can co-exist in a “crowded” field, citing two currently existing registrations for MONSTER ENERGY, Registration 3,057,061, disclaiming “ENERGY”, and B MONSTER, Registration No. 2,809,183, both identifying, *inter alia*, fruit juice in International Class 32. However, it is axiomatic that every case must be decided on its own merits. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to [applicant’s] application, the PTO’s allowance of such prior registrations does not bind the board or this court.”).

In view of the foregoing, we find that the *du Pont* factors of the similarity of the marks and the strength of the registered marks weighs in favor of finding a likelihood of confusion with the cited registrations.

The Goods and Channels of Trade

Goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

The Examining Attorney submitted numerous third-party registrations that include both the goods identified in the application and goods identified in the cited registrations. These include, for example, Registration No. 4202845 (DUBAI COLA) for, among other things, "fruit drinks and fruit juices" and "energy drinks"; Registration No. 4211325 (DRIVE M7 ENERGY DRINK) for, among other things, "fruit drinks and fruit juices," and "energy drinks"; Registration No. 4219296 (IOT STAR JOY & BEAUTY) for, among other things, "fruit juices" and "energy drinks"; Registration No. 4227746 (SIP SOCIAL IMPACT PRODUCTS TAKE A SIP FOR HUMANITY) for, among other things, "fruit drinks and juices" and "energy drinks"; Registration No. 4224775 (UFLAVOR) for, among other things, "fruit drinks, soft drinks," and "energy drinks"; and Registration No. 3293980 (POLICE FUEL) for, among other things, "fruit juices, drinking water," and "energy drinks."

These third-party registrations serve to suggest that the goods are of a type which may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

As to channels of trade, neither the identification of goods in the application nor the identification of goods in the cited registrations contain any limitations. Accordingly, we must assume that Applicant's and Registrant's goods may travel via all normal channels of trade which, since the goods are similar drinks, are likely to overlap. *See Squirtee v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983). Because these goods are common consumer items, the classes of purchasers, which is the public at large, are the same. Accordingly, the second and third *du Pont* factors weigh in favor of finding a likelihood of confusion as well.

#### Consumer Care

Applicant argues that "[t]he nature of Appellant's products clearly require selection with care and deliberation after significant Investigation [sic]." (appl's brief at 6). There is no evidence of record that consumers of energy drinks are particularly sophisticated or discerning. Accordingly, we find this *du Pont* factor to be neutral.

#### Conclusion

Considering all of the evidence and arguments of record as it pertains to the *du Pont* factors, we conclude that the marks are in their dominant literal portions substantially identical in sound, appearance and meaning and, when considered in their entirety, give the same commercial impression; the goods are related; and they are likely to be sold through the same channels of trade to the same classes of

Serial No. 77532353

purchasers. Accordingly, we find a likelihood of confusion between Applicant's mark and the marks in the cited registrations.

Decision: The Section 2(d) refusal to register is affirmed.